



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 206**

**[Docket DARS-2019-0051]**

**RIN 0750-AK67**

**Defense Federal Acquisition Regulation Supplement: Exception to Competition for Certain Follow-on Production Contracts (DFARS Case 2019-D031)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that modifies the criteria required to exempt from competition certain follow-on productions contracts.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2019-D031, using any of the following methods:

- o *Regulations.gov:* <http://www.regulations.gov>. Submit

comments via the Federal eRulemaking portal by entering "DFARS Case 2019-D031" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2019-D031." Follow the instructions provided at the "Submit a Comment" screen. Please "DFARS Case 2019-D031" on any attached documents.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2019-D031 in the subject line of the message.
- o *Fax:* 571-372-6094.
- o *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571-372-6093.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is amending the DFARS to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY)

2016 (Pub. L. 114-92). Section 815 repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103-160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b, which modifies the authority of DoD to carry out certain prototype project transactions, as well as the criteria required to award an associated follow-on production contract to a participant in the transaction without the use of competitive procedures.

Currently, DFARS 206.001(S-70) states that the award of a follow-on production contract for products developed under the authority of 10 U.S.C. 2371 is excepted from the use of competitive procedures, if: (1) the prototype project transaction agreement includes a provision for a follow-on production contract; (2) specific criteria in 10 U.S.C. 2371 note are met; and (3) the quantities and prices for the follow-on contract do not exceed the quantities and target prices established in the transaction agreement. Section 815 no longer limits a follow-on production contract to quantities and target prices that were established in the transaction agreement. As a result, this rule removes the limitation from the requisite criteria to exempt a follow-on contract from competitive procedures in subpart 206.

## **II. Discussion and Analysis**

This rule updates the DFARS 206.001(S-70) references to 10 U.S.C. 2371 to the equivalent parts of 10 U.S.C. 2371b; and,

adds to the list of criteria necessary to award a follow-on production contract without competition, the requirement that—

- A written determination was executed by certain acquisition officials for transactions in excess of specified dollar values;
- The follow-on contract be awarded to participants in the transaction for the prototype project;
- Competitive procedures were used to select the parties in the transaction; and
- The participants in the transaction successfully completed the prototype project provided for in the transaction.

The additions to the criteria do not implement new requirements. The statutes and regulations that implement DoD's other transaction authority permit DoD to provide, in the agreement, for the award of a follow-on production contract to a participant in the prototype project. Agreements made under DoD's other transaction authority are not subject to the Federal Acquisition Regulation or DFARS; however, the award of a follow-on production contract resulting from such a transaction agreement is subject to these acquisition regulations. As such, this addition serves as notice to contracting officers that: when the transaction agreement included a provision for the

award of a follow-on production contract, and the award of the contract will be made without competition, certain criteria must be met for the follow-on contract award and certain criteria must have been met during the other transaction authority process. This addition will help ensure contracting officers are aware of and in compliance with DoD's other transactional authority when awarding a resultant follow-on production contract.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule only impacts the internal operating procedures of the agency. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items.

### **IV. Executive Orders 12866 and 13563**

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of

promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **V. Executive Order 13771**

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

#### **VI. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule is not creating any new requirements for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92), which repeals and replaces section 845 of the NDAA for FY 1994 (Pub. L. 103-160; 10 U.S.C. 2371 note) with 10 U.S.C. 2371b.

The objective of this proposed rule is to clarify for contracting officers the criteria that must be met to award, without competition, a follow-on production contract associated with a prototype project transaction agreement.

DoD does not collect data on the number of follow-on production contracts that are awarded annually and associated with a prototype project transaction agreement made under the authority of 10 U.S.C. 2371b; therefore, DoD is unable to estimate the number of small entities that will be impacted by this rule. However, DoD does not expect small business entities to be significantly impacted by this rule, because the rule does not change any existing processes or impose any additional burdens. Instead, the rule simply clarifies instructions to contracting officers on the criteria that must be met in order to award an associated follow-on production contract without using competitive procedures

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives available to meet the objectives of the statutes.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2019-D031) in correspondence.

#### **VII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Part 206**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 206 is proposed to be amended as follows:

#### **PART 206—COMPETITION REQUIREMENTS**

1. The authority citation for 48 CFR part 206 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 C chapter 1.



2. Amend section 206.001 by revising paragraph (S-70) to read as follows:

**206.001 Applicability.**

\* \* \* \* \*

(S-70) Also excepted from the competition requirements of FAR part 6 are follow-on production contracts for products developed pursuant to the "other transactions" authority of 10 U.S.C. 2371b for prototype projects when—

(1) The other transaction agreement includes provisions for a follow-on production contract;

(2) The follow-on contract will be awarded to the participants in the other transaction for the prototype project;

(3) Competitive procedures are used for the selection of parties for participation in the transaction;

(4) The participants in the transaction successfully completes the prototype or sub-prototype project provided for in the transaction; and

(5)(i) There is a written determination that—

(A) The requirements of 10 U.S.C. 2371b(d) are met;  
and

(B) The use of the authority of 10 U.S.C. 2371b is essential to promoting the success of the prototype project; and

(ii) (A) For actions in excess of \$100 million, but not in excess of \$500 million including all options, the determination is executed by the senior procurement executive; and

(B) For actions in excess of \$500 million including all options, the determination is—

(1) Executed by the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment; and

(2) Provided to the congressional defense committees at least 30 days prior to contract award.

[FR Doc. 2019-20555 Filed: 9/25/2019 8:45 am; Publication Date: 9/26/2019]